of the parties. And having regard to what I have stated previously I am inclined to the view that the guarantee made by the defendants, was to use the words of section 82 of the Contracts (Malay States) Ordinance 1950, "a continuing guarantee" (corresponding to section 129 of the Indian Contract Act).

I would therefore agree with respect to the the following finding of the learned trial judge:—

"It is clear from the evidence in what manner the language of the guarantee was related to the existing facts, namely, that the defendant's guarantee was to extend up to $100,000 irrespective of Yang Pin Joo's monthly debit balance. Condition (a) of the guarantee, therefore, meant nothing more than that the defendant's liability under the guarantee was limited to $100,000, which is the amount for which he has been sued."

As I understood Mr. Peddie, his main point in his appeal is in reference to condition (a) of the letter of guarantee. In any case, in my view, the learned trial judge had dealt fully with the conditions in (b) and (c) of the guarantee and I see no reason why I should interfere with the conclusions made by him.

I would therefore dismiss the appeal with costs.

Ong Hock Thye F.J.: I agree and have only to add that, in my judgment, *Oriental Bank of Malaya Ltd.* v. *Subramaniam* [1] is, on the facts, so indistinguishable from the instant case that we are bound by *stare decisis* to follow it. I, too, would dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; Eugene Lye & Co.*

YEOH BONG PENG v. LIM PHAIK LIN

[A.C.J. (Ong Hock Sim J.) March 23, 1968]
[Penang — Civil Appeal No. 4 of 1967]

Landlord and Tenant — Subletting — Services of local authority — Consideration of reasonableness to make order — Control of Rent Ordinance, 1956 s. 12(1)(j).

The respondent/landlord brought an action against the appellant/tenant for the recovery of rent-controlled premises under section 12(1)(j) of the Control of Rent Ordinance, 1956. The learned president of the sessions court made an order for the recovery of the premises. In an appeal against this decision, the appellant relied on two main issues: (i) that there was no prohibition against subletting and, even if there was, the appellant was not in breach of section 12(1)(j) of the Ordinance; (ii) that the learned president had failed to consider whether it was reasonable to make the order.

Held, dismissing the appeal: (1) on the appellant's own admission there was evidence of a receipt of rent from the subletting contrary to section 12(1)(j) of the Ordinance;

(2) the burden was on the appellant to adduce evidence to show the payments made for services rendered by the local authority;

(3) as the claim for the recovery of possession was under section 12(1)(j) of the Control of Rent Ordinance, 1956, the court was not required to consider whether it was reasonable to make the order.

Cases referred to:—

(1) *Toh Whye Teck* v. *The Happy World Ltd.* [1953] M.L.J. 171.

(2) *Ng Hoo Kim* v. *K.A. Abdullah & Co.* [1952] M.L.J. 213.

(3) *Tham Sai Mooi* v. *M.S. Thaver* [1954] M.L.J. 187.

CIVIL APPEAL.

Jag-Jit Singh for the appellant.

Lim Kean Siew (*Daljit Singh* with him) for the respondent.

Ong Hock Sim J. (delivering oral judgment): At the commencement of this appeal, counsel for the appellant abandoned a number of the grounds which are specified in the memorandum of appeal and confined himself to 2 issues namely, first whether there is a prohibition against subletting as evidenced by the insertion of the particular note in the rent receipt, and secondly whether the tenant is in breach of section 12(1)(j) of the Control of Rent Ordinance. Counsel for the appellant further urged that the learned president had failed to consider whether it was reasonable to make the order. He also stated that costs should not have been awarded, having regard to section 13 of the Ordinance. I agree with appellant's counsel that the learned president wrongly described P.W.2 as "the clerk employed to collect rent in respect of this premises". I also agree with him that it may perhaps be unfortunate that the appellant had not the services of counsel but from his statement of defence, he apparently seemed to be a little acquainted with the law, as he even referred in his statement of defence that the case ought to be tried in the High Court under the 1941 Ordinance and said that the claim was misconceived and ought to be dismissed.

There is, in my view and on his own admission, evidence of a receipt of rent from the subletting contrary to section 12(1)(j) of the Ordinance. The appellant admitted also that the area sublet was only the front portion of the ground floor and P.W.2 stated this area to be 612 sq. ft. of a double storey building. As stated in the case of *Toh Whye Teck* v. *The Happy World Ltd.* [1]:—

"(1) It is sufficient for the respondent to establish *prima facie* that the rent received by the tenant exceeded in the aggregate 75% of the rent paid to himself; (2) since the respondent has established a *prima facie* case the rent paid to the tenant falls within the section, the burden shifts on to the appellant to show that he is covered by the provisions regarding payment of Municipal services; (3) to hold otherwise would be an unreasonable burden on the landlord."

Section 12(1)(j) reads:—

"where the tenant having sub-let the premises or part thereof received in respect of such sub-letting rents

(exclusive of any payment for the services provided by any local authority) . . . ."

and the burden therefore is upon the appellant to adduce evidence to show what payment he made which would have brought him within the protection of the Ordinance. In the evidence recorded by the learned president the appellant stated "I admit $50 is rent and $50 for furniture, telephone and water". Allowance for furniture at 1/60th will be just over $3 and for very old furniture at that the price paid for which when new being $200. It was within the means of the appellant to have adduced evidence as to the amount of charges for water he had to pay which would fall within services provided by a local authority. Telephone however is not a service of the local authority and for that you have the authority of the case of *Ng Hoo Kim* v. *K. A. Abdullah & Co.*[2] where it was held that since taking over by the Central Electricity Board, now National Electricity Board, service charges on electricity do not fall within the services provided by the local authority.

It was further urged by the appellant's counsel that the learned president ought to have considered whether it was reasonable to make the order for recovery of the premises in favour of the respondent. The learned president in his last paragraph, although he gave no reasons, considered it reasonable to grant an order that plaintiff do have recovery of premises No. 380, Penang Road, Penang, together with costs of the suit. I agree with respondent's counsel that paragraph (n) is an additional ground and in no way requires the president to consider reasonableness in a case falling within paragraph (j). It will be noted where reasonableness is required it is expressly provided in the paragraph where the court is required to consider, I refer particularly to section 12(1)(b) where any obligation of the tenancy other than the payment of rent (whether under the contract of tenancy or under the provisions of this Ordinance), so far as the obligation is consistent with the provisions of this Ordinance, has been broken or not performed by the tenant and the court considers it *reasonable* that such order or judgment be made or given. This is supported by the case of *Tham Sai Mooi* v. *M.S. Thaver* [3]:—

"The plaintiff (appellant) claimed for possession of certain premises under section 13(1)(k) of the Control of Rent Ordinance, 1948, the defendant (respondent) having been convicted of offences in breach of the law in force relating to Municipalities. He had been served with a notice to quit. The learned president of the sessions court held that there was a general discretion in the court, and also a particular discretion arising from the negative and prohibitory phraseology of the opening lines of section 13(1), and gave judgment for the defendant with costs.

Held on appeal: the trial court has no jurisdiction to exercise a discretion unless it is expressly required to consider the question of reasonableness."

In the circumstances the appeal must be dismissed. Counsel had referred to the question whether the learned president ought to have awarded costs in the court below against the appellant. Having regard to the nature or the basis of the claim for possession by the plaintiff, I think it is within the competence of the learned president to have awarded costs.

This appeal is therefore dismissed also with costs.

Appeal dismissed.

Solicitors: *Jag-Jit Singh; Lim Cheang Ean & Co.*

EU HOONG CHWEE v. CHUA SAY TIONG

[O.C.J. (Raja Azlan Shah J.) March 27, 1968]
[K.L. — Civil Suit No. 1561 of 1966]

Practice and Procedure — Lapse of time for appeal — Application to extend time — O. 64 r. 7, R.S.C. 1957.

Practice and Procedure — Summary judgment under O. 14 — Defendant's absence at hearing — Application under O. 27 r. 15 to set aside judgment — Whether judgment obtained "by default".

The plaintiff, in an action for the recovery of money, made an application for judgment under O. 14. The defendant failed to appear at the date of hearing and the registrar ordered final judgment to be entered against him.

Nothing was done by the defendant until after ten months later when he was served with the bankruptcy notice followed by the usual creditor's petition. He filed this application praying for extension of time to appeal against the final judgment obtained under O. 14, and alternatively to set aside the judgment under O. 27 r. 15.

Held, dismissing the application: (1) from the circumstances of the case, the defendant's application for leave to appeal out of time was made *mala fides*, in order to gain time. The court would not exercise its discretion under O. 64 r. 7 for the extension of time for appeal;

(2) a judgment obtained under O. 14 is not a judgment obtained in default and O. 27 r. 15, therefore has no application to the present case.

Case referred to:—

(1) *Spira* v. *Spira* [1939] 3 All E.R. 924.

CIVIL SUIT.

M. J. Mathew for the plaintiff.

C. Thambiah for the defendant.

Cur. Adv. Vult.

Raja Azlan Shah J.: This case seems to me to raise for authoritative decision the question as to the right of a defendant to ask for leave (1) to appeal out of time against a final judgment under O. 14, and (2) to set aside the said judgment.

Before I proceed further, it will be useful to recount the events that had transpired hitherto. The plaintiff, an architect, claimed against the